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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Amitabho Chattopadhyay,
et. al.
Plaintiffs,
v.

BBVA Compass Bancshares, Inc.,
et. al.,
Defendants.

Case No. 3:19-cv-01541-JST

**PLAINTIFFS' OPPOSITION TO
MOTION TO DISMISS
PURSUANT TO RULE 12(b)(6)**

Date: October 2, 2019
Time: 2:00 p.m.
Room: Courtroom 9 - Floor 19
450 Golden Gate Ave.
San Francisco, CA 94102

Judge: Hon. Jon Tigar

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs in the above-captioned case hereby submit their opposition to defendants' Motion to Dismiss Pursuant to Rule 12(b)(6).

Respectfully submitted,
/s/ Erin L. Brinkman
Erin L. Brinkman
August 19, 2019
Counsel for Plaintiffs

1 | **MEMORANDUM OF POINTS AND AUTHORITIES**

2 | Defendants have brought up one main argument in favor of dismissal: that they are justified in discriminating against non-citizens with valid social security numbers to in order to avoid
 3 | running afoul of a money laundering statute which has not prevented any other national banks
 4 | from opening accounts for them¹. The class consists predominantly of highly skilled workers,
 5 | executives, NATO employees, ambassadors and diplomats, traders, investors, students, asylees and
 6 | legal immigrants (*see* Social Security Administration POMS RM 10211.530), all of which have
 7 | been exhaustively evaluated by the Department of Homeland Security. *See* 8 U.S.C. 1225.

8 | **A. The defendants' Bank Secrecy Act argument, assuming *arguendo* that it is in any
 9 | way applicable to this discussion, is not ripe for disposition in a motion to dismiss.**

10 | At the outset, Defendants raise matters outside the pleadings that are simply not appropriate for disposition at this early stage. Even if their patently absurd suggestion that non-citizens
 11 | with valid social security numbers are somehow more difficult to identify is true (Defendants'
 12 | Motion to Dismiss Complaint Pursuant to Rule 12(b)(6), ECF #19, ("Defendants' Motion") pgs.
 13 | 5-6), that would be a factual question to be decided on a motion for summary judgment, after
 14 | both parties have had the opportunity to conduct adequate discovery (especially with respect
 15 | to the data, if any, upon which Defendants relied to reach such a determination²). Defendants'
 16 | argument that the Bank Secrecy Act ("BSA") requires them to discriminate against non-citizens
 17 | is tantamount to asserting that individual banks have been delegated nonreviewable authority by
 18 | Congress to exclude any category of person from opening a bank account by them according to
 19 | any criteria which they see fit. This is a frivolous argument; Defendants do not cite any provision

20 |

 21 | ¹ There are two banks of which plaintiffs are aware, PNC and Huntington Bank, which only
 22 | allow non-citizens to apply in person. (Defendant Compass Bank engages in this practice as well
 23 | for its in-person operation.) While this is still discriminatory and a violation of the Act, it does
 24 | not match the audacity of the total denial of service which Simple engages in. Some banks require
 25 | a picture of photo ID or simply don't allow anyone to sign up online, which is another matter alto-
 26 | gether.

27 | ² Defendants have furnished neither the plaintiffs nor the court with any evidence that they
 28 | even operate any so-called 'Customer Identification Program', nor any particulars thereof besides
 29 | that it requires them to exclude all non-citizens.

1 of the BSA which suggests that banks are to be allowed to discriminate against non-citizens in
 2 this matter and be completely immune to liability for their actions. Instead, they merely cite a
 3 provision of the relevant regulations, 31 C.F.R. § 1020.220(a)(2)(iii)(A), which provides that the
 4 bank's Customer Identification Program should describe when the bank should not open an ac-
 5 count. Nothing in the statute or regulations can be construed to immunize Defendants for their
 6 clearly and arbitrarily discriminatory policy.

7 **B. The defendants' Bank Secrecy Act argument has no basis in fact or law.**

8 **I. The PATRIOT Act did not repeal the Civil Rights Act of 1866, implicitly or**
 9 **explicitly; requiring banks to identify their customers does not require them to**
 10 **refuse to deal with non-citizens.**

11 Defendants' claim is that in implementing the BSA, Congress gave license to the defen-
 12 dants to discriminate against any non-citizen, so long as the bank codifies this discrimination
 13 in the form of a 'Customer Identification Program' intended to verify the identity of those who
 14 would open accounts with the bank based on the institution's risk assessment. Defendants' Mo-
 15 tion, pg. 14.

16 This purported justification Defendants provide for their discriminatory conduct is made
 17 on the basis of an erroneous statutory interpretation. "When there are two acts upon the same
 18 subject, the rule is to give effect to both if possible... There must be a positive repugnancy between
 19 the provisions of the new law and those of the old; and even then the old law is repealed by
 20 implication only, pro tanto, to the extent of the repugnancy." *United States v. Borden Co.*, 308 U.S.
 21 188, 198-99 (1939).

22 In evaluating those individuals applying to open online bank accounts, Defendants were
 23 confronted with two complementary duties: to verify the identity of potential customers for
 24 national security purposes, pursuant to the BSA, and treating all of their customers the same as
 25 they would treat a citizen, pursuant to 42 U.S.C. § 1981 ("Section 1981"). They have affirmatively
 26 chosen to not to do the latter in the process of supposedly attempting to fulfill their obligation
 27 to do the former. The difference (not differences) between non-citizens and citizens in the Bank

1 Secrecy Act are directly targeted towards ensuring that non-immigrant non-citizens without
 2 taxpayer identification numbers can open bank accounts - a totally different issue than the issue
 3 presented here, where non-citizens with valid social security numbers share an identical position
 4 for the purposes of opening a bank account as do U.S. citizens.

5 Yes, as the plaintiffs claim, the BSA distinguishes between citizens and non-citizens.
 6 It does so in one respect, and in one respect only: while citizens must provide a social security
 7 number, non-citizens are not required by law to do so; they can choose to provide a social security
 8 number, an ITIN, an A-number or even their own government-issued ID. Indeed, this choice of
 9 which document to provide was intended to *avoid* the discrimination which defendants believe
 10 the BSA legalized³. 31 C.F.R. 1020.220(a)(2)(i). This underscores Congress' recognition of the
 11 statistically lesser threat that non-citizens pose, and clearly undermines defendants' claim that
 12 Congress has given them license to discriminate against non-citizens in this way.

13 In other words, there is a 'difference' between citizens and non-citizens in the Bank Se-
 14 crecy Act in the way that there is a 'difference' between disabled and non-disabled patrons in the
 15 Americans with Disabilities Act. The defendants may as well refuse service to people in wheel-
 16 chairs on the basis that the relevant regulations prescribe possible methods for achieving equal
 17 access to facilities for wheelchair users.

18 Defendants claim that because the BSA and Section 1981 regulate the same conduct,
 19 the provisions of the BSA necessarily annihilate the long-established protections of one of this
 20 country's most historically significant and crucially important civil rights legislation. Defendants
 21 make this ridiculous claim based upon a tenet of statutory interpretation that they misconstrue.
 22 Rather, the "general/specific canon is not an absolute rule," but, rather, one of statutory construc-

23 _____
 24 3 This issue has been subject to litigation in the opposite direction in the California state
 25 courts, with the argument that the requirement that citizens must provide a valid social security
 26 number discriminates against U.S. citizens. See *Howe v. Bank of America, NA*, 179 Cal. App. 4th
 27 1443 (2009) (affirming grant of demurrer to complaint because federal law requires social security
 number collection, allowing alternative forms of ID for foreigners). The regulation was implemented
 in such a way to ensure that non-work-authorized foreigners, such as businessmen and
 students, could open bank accounts in the country.

1 tion. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 646 (2012) In that regard,
 2 “[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not
 3 favored.” *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).

4 Defendants’ citations to the contrary are inapposite. Their particular application of
 5 *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) is inapposite because one statute clearly
 6 superseded the other, one set of choice of venue provisions being incompatible with another;
 7 *Morton v. Mancari*, 417 U.S. 535 (1974), on the other hand, clearly supports *Plaintiffs’* position,
 8 because a “longstanding, important component” of public policy and Congress’ implementation
 9 of the 14th Amendment is protection against discrimination⁴. An example (inherently hypothet-
 10 ical, because the weakness of the defendants’ argument is such that no published citation may
 11 be found for it) of defendants’ logic would be an argument that 28 U.S.C. § 1332(a) repealed
 12 28 U.S.C. § 1331, barring all cases arising under the Constitution, laws or treaties of the United
 13 States from being brought in federal court.

14 Plaintiffs’ counsel knows better than to attempt to cite unpublished, pending cases. As
 15 such, Plaintiffs feel no need to argue the similarity between this case and *Perez v. Wells Fargo*
 16 & Co., No. 17-CV00454-MMC, 2017 in depth at this juncture. Nonetheless, the defendants
 17 bizarrely continue their argument in this respect by suggesting that non-citizens would inher-
 18 ently “constitute a direct threat to the health and safety of other individuals” if allowed to open a
 19 bank account with them. 42 U.S.C. § 3604. Would a landlord be justified in refusing to rent for
 20 non-citizens because, in his subjective judgment, he fears they might bomb the complex simply
 21 because they are non-citizens?

22 Defendants then analogize a non-citizen not being allowed to open a bank account to a
 23 train conductor with hearing challenges only being allowed to operate trains without passengers
 24 in them. Defendant’s Motion, pg. 11. The analogy is lost on plaintiffs. There is simply no logical
 25 connection between one and the other.

26 4 Also, this is an example where an earlier provision was held to not be subject to implied
 27 repeal by the enactment of a later, general statute. As much as the defendants would like it to have
 done, the PATRIOT Act was not intended to abolish all civil rights protections for non-citizens.

1 **II. The defendants' premature factual arguments are predicated on baseless stereo-**
 2 **types.**

3 Defendants appear to be obsessed with the 'alien-ness' of non-citizens. They ponder at
 4 length, for example, over the possibility that non-citizens may present a plethora of foreign, in-
 5 scrutable documents which they would then be forced to interpret and verify the authenticity of.
 6 Defendants' Motion, pp. 12-13. Defendants neglect to acknowledge that non-citizens with social
 7 security numbers have state-issued drivers' licenses and identification cards. 13 Code of Califor-
 8 nia Regulations §§ 15.00 & 16.04. They have passports with machine-readable visas, containing
 9 photographs and identifying information. They possess the USCIS Employment Authorization
 10 Document or permanent resident card. Each of these documents, in addition to foreign pass-
 11 ports, are generally accepted for identification purposes by government agencies and other banks.
 12 *See* Plaintiffs' Request for Judicial Notice, No. 3.

13 By definition, a non-citizen with a valid social security number can be more quickly and
 14 easily vetted than any citizen. This is because non-citizens must undergo numerous and lengthy
 15 background checks in order to obtain the antecedent status which gives them work authorization.
 16 When they obtain a social security number, their assigned registration number(s) are checked
 17 electronically or, if that is unsuccessful, by a review of paper records, before a number is issued.
 18 They are more well-identified than any other type of person present in this country, each of them
 19 literally handpicked by the federal government to reside in the United States.

20 Accordingly, it seems Defendants believe they know better than the federal government
 21 what constitutes a security risk. To justify their illegal discrimination, they cling to a federal law
 22 that neither mandates nor condones their discriminatory conduct. Ironically, this law, the BSA,
 23 was written in such a way as to avert discrimination of the kind perpetrated by Defendants and
 24 accommodate the opening of bank accounts by non-citizens beyond even the category asserted in
 25 this action.

26 **III. Exactly what the defendants' irrational and unsubstantiated rationale was a**
 27 **pretext for is irrelevant.**

1 Defendants further argue that, because the plaintiffs have not alleged exactly what drove
 2 Defendants' discriminatory behavior, Plaintiffs have failed to state a cause of action.

3 Certainly, Defendants' actual motivations are a mystery. As they admit in their memo-
 4 randum, they could be terrified, more than any other bank in the country, that the majority of
 5 non-citizens with valid social security numbers may in fact be, in general, terrorists, gangsters,
 6 foreign dictators, or other nefarious characters. Similarly irrational concerns no doubt propelled
 7 BBVA, in the absence of any similar statutory justification, to convert funds which they held in
 8 trust for ordinary Chinese citizens in Spain⁵. Perhaps, given their record, it is foolish for non-cit-
 9 izens to sue for the right to open an account with them: they may just steal their money after the
 10 fact and hope that the affected individuals are too afraid or lack the resources to sue.

11 For good reason, however, Defendants' actual motivations for their blatant discrimination
 12 against non-citizens are irrelevant. Two simple facts remain: Defendants (1) refused to contract
 13 with Plaintiffs, (2) a substantial motivating reason for this discrimination being that Plaintiffs
 14 were non-citizens. Neither the Unruh Act nor the Civil Rights Act requires that Plaintiffs prove
 15 an alternative motive. 42 U.S.C. § 1981; California Civil Jury Instructions No. 3060.

16 Incapable of finding anything remotely relevant, defendants instead cite a variety of
 17 district court cases from Ohio, New Jersey and Michigan applying 49 U.S.C. § 44902(b). These
 18 cases, irrelevant to the case at bar, provides air carriers with the discretion to refuse to trans-
 19 port passengers if the carrier believes that they may be inimical to safety, with "[s]uch... refusal"
 20 not "giv[ing] rise to a claim for damages under either federal or [state] law unless the carrier's
 21 decision was arbitrary and capricious." *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d
 22 Cir.1975). Here, no such immunity, explicit or implied, exists for Defendants. Moreover, in each
 23 of these cases, the fundamental theme is that of a case-by-case, time-sensitive determination to
 24 remove passengers who the captain reasonably perceived, mistakenly, to be acting suspiciously e.g.
 25 pacing about and apparently trying to get into the cockpit, (*Al-Qudhai'een v. America West Air-*

26 ⁵ *Furious Chinese blast 'racist' Spanish bank for money laundering bans*, South China Morning
 27 Post (2019), <https://www.scmp.com/news/world/europe/article/2186410/furious-chinese-condemn-racist-spanish-bank-bbva-saying-it-locked> (last visited May 26, 2019)

1 *lines, Inc.*, 267 F. Supp. 2d 841 (S.D. Ohio 2003)), two people apparently pretending not to know
 2 one another yet whispering to each other, one of them shifting their duffel bag around nervously
 3 (*Dasrath v. Cont'l Airlines, Inc.*, 467 F. Supp. 2d 431 (D.N.J. 2006)), a man claiming to be travel-
 4 ing alone yet evidently having come to the airport together with a group of five or six other men
 5 and staring intently at a flight attendant. *Al-Watan v. Am. Airlines, Inc.*, 658 F. Supp. 2d 816 (E.D.
 6 Mich. 2009).

7 Nonetheless, the defendants' attempt to apply the Federal Aviation Act, however weak,
 8 perfectly betrays the nature of their policy. Rather than the case-by-case determinations which
 9 the FAA requires for this qualified immunity to apply, the alternative conduct—in which the de-
 10 fendants admit to engaging—is a total exclusion of all non-citizens, including non-citizens with
 11 valid social security numbers.

12 Assuming *arguendo* that the allegations in the complaint are insufficient to survive a mo-
 13 tion to dismiss, Defendants' own motion, consisting of a sustained barrage of repugnant stereo-
 14 types and irrational fears about non-citizens, is the most powerful argument in favor of awarding
 15 Plaintiffs leave to amend. Moreover, their behavior need not be rational for it to be actionable:
 16 their explicitly stated, irrational belief that non-citizens with valid social security numbers pose a
 17 greater risk of terrorist or money-laundering activity is an impermissible rationale in itself.

18 **C. Defendants' Unruh Act public policy argument has no basis in fact or law.**

19 Defendants' assert that their desire to prevent terrorist financing is sufficiently compelling
 20 that it legally permits them to bar non-citizens possessing valid social security numbers from
 21 opening bank accounts with them. Defendants have provided no sound argument, much less any
 22 compelling evidence, that their policy is nonarbitrary, or that there is any greater risk in opening
 23 bank accounts for non-citizens with social security numbers than for citizens; even if they had
 24 provided any such information, this would simply present a factual question to be determined
 25 with through a thorough discovery process. Defendants' argument is effectively equivalent to an
 26 argument that Defendants would be justified in barring elderly clients because, in their person-
 27 al, unreviewable, unevidenced opinion, these potential customers may be more likely to commit

1 fraud. For good reason, the *only* examples that can be provided by Defendants are examples where
 2 a certain discount has been provided based on age⁶ or where a gift bag was given only to mothers
 3 of all genders⁷, not where there has been a total denial of service based on some kind of unsub-
 4 stantiated notion that a statutorily enumerated class of individuals is more likely than any other
 5 class to pos a threat to the safety of others.

6 **D. Sufficient factual allegations have been pled against Defendants. Even if this
 7 Court finds to the contrary, leave to amend should be granted.**

8 Plaintiffs' claims against BBVA and its subsidiaries, a brand which has a well-documented
 9 history of discriminating against non-citizens in countries where they operate, are as well-pled
 10 as they can be given the limited amount of public information available regarding the company's
 11 internal structure. Even if specific allegations of discrimination have not been adequately alleged
 12 against each and every defendant, all defendants may be held liable on a theory of conspiracy
 13 because they each encouraged, financed and collaborated in implementing their discriminatory
 14 agenda. A conspirator cannot be absolved of liability merely because their involvement was limit-
 15 ed to encouraging, financing or collaborating in their illegal behavior.

16 **CONCLUSION**

17 The most powerful citations against the defendants' motion are (1) their own memoran-
 18 dum in support thereof and (2) common sense. When it comes down to it, the only thing the
 19 defendants can offer is speculation that the identities of non-citizens may not be as ascertainable

20 _____
 21 6 The intermediate state appellate courts are split on the issue of senior discounts; while the
 22 Second District has stated that discounts to 18-30 year olds may not be awarded because they are
 23 merely more likely to be budget constrained, regardless of any statistical analysis supporting that
 24 supposition, because there are significant exceptions to that general rule (*Candelore v. Tinder, Inc.*,
 25 19 Cal. App. 5th 1138 (2018)), the First District has decided the polar opposite. *Javorsky v. Western*
 26 *Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386. Because there is no lateral stare decisis in
 27 the California intermediate appellate courts, this issue is unlikely to be resolved until the California
 Supreme Court decides it. Of course, the issue is still irrelevant to the total denial of service at
 issue here.

7 Gender-based *discounts*, on the other hand, run afoul of the Unruh Act. *Koire v. Metro*
 28 *Car Wash*, 40 Cal.3d 24 (1985). The senior discount argument originates from dicta which has on
 29 occasion been discarded. See *Candelore*, supra.

1 as those of citizens, when the opposite is judicially noticeable, and that, in direct contrast to what
2 the federal government has determined about these individuals, they believe that non-citizens
3 with valid social security numbers pose an immediate threat to national security.

4 This is not a defense: it is an admission.

5 The motion should be denied.

6 Respectfully submitted,
7 /s/ Erin L. Brinkman
8 Erin L. Brinkman
9 August 19, 2019
10 Counsel for Plaintiffs

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